83-261

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

CARSON S. GABLE, JOSEPH S. DADDONA, and THE CITY OF ALLENTOWN,
Petitioners

vs.

ROGER SAMES and DENNIS TROCCOLA,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

When a notice of appeal must be dismissed as a nullity, do *Griggs vs. Provident Consumer Discount Co.*, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982) (notice of appeal filed during pendency of timely motion under FRCP 52 or 59 is a nullity), and the Federal Rules of Appellate Procedure (Rule 26(b): court of appeals may not enlarge time for filing notice of appeal; Rule 4(a)(5): district court may extend time for filing notice of appeal only upon a showing of excusable neglect or good cause upon motion filed not later than thirty (30) days after expiration of appeal period) permit a court of appeals to invite the appellant to request the district court to vacate and reinstate its judgment to permit appellate review of that judgment?

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PETITION FOR WRIT OF CERTIORARI

Petitioners Carson S. Gable, Joseph S. Daddona and The City of Allentown, defendants in the District Court and appellees in the Court of Appeals[1] respectfully petition this Honorable Court to issue a writ of certiorari to the United States Court of Appeals for the Third Circuit for review and vacatur of that portion of the judgment, entered by the Court of Appeals in the matter captioned as *SAMES Roger; TROCCOLA, Dennis, Appellants vs. GABLE, Carson S.; DADDONA, Joseph S.; CITY OF ALLENTOWN*, and docketed in the Court of Appeals at No. 82-1456, which permits respondents Roger Sames and Dennis Troccola, plaintiffs in the District Court, to move

1. The only other parties in the lower courts were respondents Roger Sames and Dennis Troccola.

the District Court to vacate and re-enter judgment so as to allow respondents to appeal from the re-entered judgment.

OPINIONS BELOW

The text of the opinion of the District Court is set forth as Appendix F to this petition. The opinion of the District Court has been published, *Sames vs. Gable*, 542 F.Supp. 51 (E.D.Pa. 1982). The text of the opinion of the Court of Appeals is set forth as Appendix B to this petition. The opinion of the Court of Appeals was marked by the court "NOT FOR PUBLICATION" and has not been published.

GROUNDS FOR JURISDICTION

The judgment of the Court of Appeals was filed on June 15, 1983. The text of that judgment is set forth as Appendix A to this petition. Petitioners timely filed a petition for rehearing with the Court of Appeals, which denied that petition on July 14, 1983. The text of the order of the Court of Appeals sur rehearing is set forth as Appendix C to this petition. Jurisdiction to review the judgment of the Court of Appeals is conferred upon this Honorable Court by 28 U.S.C. Section 1254(1).

STATUTES AND RULES

Rule 4(a) of the Federal Rules of Appellate Procedure states:

> (a) Appeals in Civil Cases:
>
> (1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from, but if the United States or an officer or agency thereof is a party the notice of appeal may be filed by any party within 60 days after such entry.

If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

(2) Except as provided in (a) (4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of judgment or order shall be treated as filed after such entry and on the day thereof.

(3) If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires.

(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time pre-

scribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be ex parte unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extention shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

(6) A judgment or order is entered within the meaning of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.

Rule 26(b) of the Federal Rules of Civil Procedure states:

(b) Enlargement of Time. The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act or may permit an act to be done after the expiration of such time but the court may not enlarge the time for filing a notice of appeal a petition for allowance, or a petition for permission to appeal. Nor may the court enlarge the time prescribed by law for filing a petition to enjoin, set aside, suspend modify, enforce or otherwise review, or a notice of appeal from an order of an administrative agency, board, commission or officer of the United States, except as specifically authorized by law.

Rule 60(b) of the Federal Rules of Appellate Procedure states:

(b) Mistakes, Inadvertence, Excusable Neglect, Newly Discovered Evidence, Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or ex-

cusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application, or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28 U.S.C. Section 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

STATEMENT OF THE CASE

Respondents commenced this civil action to obtain relief for alleged deprivations of their civil rights by petitioners. Respondents claimed that their demotions by petitioners from the rank of police sergeant to the rank of patrolmen without a hearing violated their property rights to their sergeant stripes and their First Amendment rights because their demotions were motivated only by retaliation for their support of petitioner Daddona's mayoralty opponent. Petitioners asserted, and the District Court found, that the demotions could be effected under controlling state law without a hearing, and that the demotions were not politically motivated but necessitated by the respondents' other conduct which was disruptive to the morale of the police department. Subject matter jurisdiction of the District Court for these civil rights claims was predicated upon 28 U.S.C. Section 1343. Respondents also appended various state claims.

By way of a judgment, an order and an opinion entered June 25, 1982[2] the District Court disposed of the matter by granting petitioners' motion to dismiss and motion for summary judgment which respondents had contested on the merits. The District Court dismissed all of respondents' claims predicated upon an alleged unconstitutional taking of property, entered judgment in favor of petitioners and against respondents with respect to all of respondents' claims predicated upon an alleged political firing, and dismissed respondents' pendent state claims without prejudice.

On July 6, 1982, respondents served petitioners with a motion for reconsideration, which was filed in the District Court on July 8, 1982. While that motion was pending, respondents filed a notice of appeal on July 23,

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2. The text of the District Court's judgment is set forth as Appendix D to this petition. The text of the District Court's order is set forth as Appendix E to this petition. The text of the District Court's opinion is set forth as Appendix F to this petition.

1982. On September 17, 1982, the District Court denied respondents' motion for reconsideration. Respondents filed no further notice of appeal.

On June 15, 1983, the Court of Appeals dismissed respondents' appeal without prejudice to their moving the District Court under Federal Rule of Civil Procedure 60(b) to vacate and re-enter judgment so as to allow respondents to appeal from the re-entered judgment.[3] Rejecting respondents' contentions that their motion for reconsideration was not a motion within the scope of F.R.A.P. 4(a)(4), that their motion was not timely, and that *Griggs vs. Provident Consumer Discount Co.*, 103 S.Ct. 400 (1982), was inapplicable, the Court of Appeals held that respondents' notice of appeal was a nullity. The Court of Appeals declined to consider "whether this case involves 'unique circumstances' such as those recognized by the Supreme Court in *Thompson vs. INS*, 375 U.S. 384 (1964)(per curiam)", and held, without citation of authority or discussion, that "In the past, however, this Court has allowed appellants in similar circumstances to move the District Court under Fed. R.Civ.P. 60(b) to vacate and re-enter judgment so as to allow appellants to appeal from the re-entered judgment. We believe that that procedure provides a fair result for both parties in this case as well" (Opinion of the Court, A-5 & A-6, infra.). On July 25, 1983, the Court of Appeals denied petitioners' timely petition for rehearing.[4] In their petition for rehearing, petitioners contended that the Court of Appeals should not have permitted respondents to proceed as delineated by that Court.

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3. The text of the judgment of the Court of Appeals is set forth as Appendix A to this petition. The text of the opinion of the Court of Appeals is set forth as Appendix B to this petition.

4. The text of the court of appeals order sur rehearing is set forth as Appendix C to this petition.

ARGUMENT

The decision below should be reviewed because it seriously hampers proper and uniform administration of the rules of procedure governing litigation in the federal courts. The decision of the Court of Appeals conflicts with and departs from decisions rendered by this Honorable Court, other decisions rendered by the Court of Appeals, and decisions rendered by other Courts of Appeal:

At the times material to respondents' appeal, F.R.A.P. 4(a)(4) stated:

> "If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing"

In *Griggs vs. Provident Consumer Discount Co.*, 680 F.2d 927, 929 n.2 (3d. Cir., 1982), the Court of Appeals below held that, although a notice of appeal was subject to dismissal under Rule 4(a)(4) when it was filed during the pendency of a timely Rule 59 motion, appellants could proceed unless appellees could show prejudice resulting from the premature filing of the notice of appeal. In *Griggs vs. Provident Consumer Discount Co.*, 103 S.Ct. 400 (1982), this Honorable Court granted a petition for writ of certiorari and vacated the judgment of the Court of Appeals. Noting that Rule 26(b) of the Federal Rules of Appellate Procedure explicity prohibits

Courts of Appeals from enlarging the time for filing a notice of appeal, 103 S.Ct. at 403, 404, n.3, this Honorable Court held that a Court of Appeals had no discretion to waive conceded defects in a premature notice of appeal, and that;

> ". . . The notice of appeal filed in this case on November 19, 1980, was not merely defective, it was a nullity. Under the plain language of [Rule 4(a)(4)], a premature notice of appeal 'shall have no effect' a new notice of appeal 'must be filed'. In short, it is as if no notice of appeal were filed at all. And if no notice of appeal is filed at all, the Court of Appeals lacks jurisdiction to act. It is well settled that the requirement of a timely notice of appeal is 'mandatory and jurisdictional' ". 103 S.Ct. at 403

On remand from this Honorable Court, the Court of Appeals dismissed the appeal in *Griggs* for lack of appellate jurisdiction, *Griggs vs. Provident Consumer Discount Co.*, 699 F.2d 642 (3d Cir., 1983). The Court there did not permit the appellant the further relief offered here. *Accord, Behring International, Inc. vs. Imperial Iranian Air Force*, 699 F.2d 657, 665-666 (3d Cir., 1983). Similarly, in *de la Fuente vs. Central Electric Cooperative, Inc.*, 703 F.2d 63 (3d Cir., 1983), the Court of Appeals dismissed an appeal because appellant's motion for a new trial was not timely. Even though the district court in that case had entertained the untimely motion and the appellant filed a notice of appeal eight days after the motion was denied, the Court of Appeals did not afford that appellant the relief extended here, and found no "unique circumstances", 703 F.2d at 65, n.4.

The decision of the Court of Appeals in this case, to the extent that it permits further relief in spite of an invalid appeal, conflicts not only with its decisions in *Griggs*, *Behring* and *de la Fuente*, *supra*, but also with decisions rendered by the Courts of Appeal for the Fifth, Tenth, and Eleventh Circuits. In *Beam vs. Youens*, 664 F.2d 1275 (5th Cir., 1982), appellant filed a notice of ap-

peal before resolution of appellant's motion for a new trial, and the Court of Appeals dismissed the appeal without affording appellant the further relief extended to respondents in this case. The same results were reached by the Tenth Circuit in *Century Laminating, Ltd. vs. Montgomery*, 595 F.2d 563 (10th Cir., 1979), and by the Eleventh Circuit in *Gibbs vs. Maxwell House, Div. of Gen. Foods Corp.*, 701 F.2d 145 (11th Cir., 1983), *accord, Florida Women's Med. Clinic, Inc. vs. Smith*, 706 F.2d 1172 (11th Cir., 1983).

The decision of the Court of Appeals in this case effectively enlarges by indirection respondents' time for appeal. As such, the decision directly conflicts with Rule 26(b) of the Federal Rules of Appellate Procedure, which explicitly states that a court of appeals may not enlarge the time for filing a notice of appeal. In *United States vs. Robinson*, 361 U.S. 220, 80 S.Ct. 282 (1960), this Honorable Court held, in construing a predecessor to Rule 26(b), that enlargement of the time for appeal is prohibited even when excusable neglect may be found. More recently, in *Williams vs. Bolger*, 633 F.2d 410 (5th Cir., 1980), the Fifth Circuit suggested that the 1979 revisions to the Federal Rules of Appellate Procedure "ended the possibility of an equitable excuse . . . from the ban on premature filings", 633 F.2d at 412-413 n.2. In the instant case, however, the Court of Appeals declined to resolve whether "unique circumstances" obtained, but permitted respondents further relief.

In the absence of "unique circumstances", and in light of the appellate rules' prohibition forbidding the court to "enlarge the time for filing a notice of appeal", F.R.A.P. 26(b), this Honorable Court's pronouncements in *Griggs* and the actions taken by the court of appeals in *Griggs*, *Behring* and *de la Fuente* call into question the validity of the remand procedure delineated in the Court of Appeals' opinion and judgment in this case.

F.R.C.P. 60(b), which the Court of Appeals called to respondents attention states:

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; and (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not effect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28 U.S.C. Section 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review are abolished, and the procedure for obtaining any relief from a judgment shall be by a motion as prescribed in these rules or by an independent action".

Of additional interest is F.R.A.P. 4(a)(5), which states:

"The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the prescribed

> time may be ex parte unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later"

Petitioners respectfully suggest that where no "unique circumstances" obtain, as is the situation in this case, no relief may be had under F.R.C.P. 60(b) or F.R.A.P. 4(a)(5), even if the required motions under these rules could be made in time.

In *Perrin vs. Aluminum Co. of America*, 197 F.2d 254 (9 Cir., 1952), and in *Wagner vs. United States*, 316 F.2d 871 (2 Cir., 1963), appellants who had earlier failed to perfect valid appeals were not permitted to use Rule 60(b) to obtain review or to extend the time for appeal. As noted by the Court in *Perrin*, 197 F.2d at 255.

> ". . . Rule 60(b) was not intended to be resorted to as an alternative to review by appeal, nor as a means of enlarging by indirection the time for appeal except in compelling circumstances where justice requires that course. *Cf. Hill vs. Hawes*, 320 U.S. 520, 64 S.Ct. 334, 88 L.Ed. 283. Appellants had opportunity to obtain appellate review of the very rulings of which they now complain but failed to take advantage of the opportunity within the time prescribed by Rule 73(a). Having in consequence of their own lack of diligence been turned away at the front door they now seek entry at the rear. Certainly Rule 60(b) was not designed to afford machinery whereby an aggrieved party may circumvent the policy evidenced by the rule limiting the time for appeal. . . ."

In the same vein, Professor Moore's analysis of Rule 60(b) has noted.

7 *Moore's Federal Practice* ¶ 60 27[1]:

> "Like 60(b) generally, clause (6) cannot be used as a substitute for appeal. Absent exceptional and compelling circumstances, a party will not be granted relief from a judgment under clause (6); even though relief from the judgment might have been obtained had an appeal been taken, where an appeal was taken but was dismissed because not perfected, or because it was untimely. . . ."

and that, *Id.*, ¶60.27[2]

> ". . . Any view that mere error of law is a basis for relief under Rule 60(b)(6) would be in the teeth of Rule 4(a) of the Appellate Rules, since it would result simply in the vacation and reinstatement of the judgment, thus extending the rigid limits on time for appeal. It may be argued, therefore, that a motion that does not put forth grounds for 'relief from the operation of the judgment' as distinct from relief from the strictures upon time for appeal 'does not fall within Rule 60(b)(6)' ".

The Court of Appeals may not extend the time for filing a notice of appeal, F.R.A.P. 26(b), and that time has long since run from the District Court's September 17, 1982 order. The District Court was empowered to extend the time for thirty days under F.R.A.P. 4(a)(5), but because respondents did not act within the time required, the District Court has lost its power to extend the appeal period. *Wyzik vs. Employee Benefit Plan of Crane Co.*, 663 F.2d 348 (1 Cir. 1981); *Briggs vs. Lucas*, 678 F.2d 612 (5 Cir 1982). Because of the strictures placed by these rules, it would be most inappropriate for the lower courts to attempt to accomplish by indirect means that which cannot be done by direct means within the rules. *see, e.g. Hensley vs. Chesapeake & Ohio Ry. Co.*, 651 F.2d 226 (4 Cir., 1981) (in light of rule, courts without power to vacate and reinstate where failure to receive notice is sole ground for relief); *accord, Wilson vs.*

Atwood Group, 702 F.2d 77 (5 Cir., 1983). In addition, with respect to time, Rule 60(b) mandates that "The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken ', and more than one year has passed since the District Court's June 25, 1982, order was entered.

The Court of Appeals in the past has recognized that Rule 60(b) is not a substitute for an appeal, and that it provides extraordinary relief which may be granted only upon a showing of exceptional circumstances, *Vecchione vs. Wohlgemuth*, 558 F.2d 150, 159 (3 Cir 1977); *Mayberry vs Maroney*, 558 F.2d 1159, 1163 (3 Cir. 1977); *John E. Smith Sons Co. vs. Lattimer Foundry & Machine Co.*, 239 F.2d 815 (3 Cir., 1956); *Accord, Horace vs. St. Louis Southwestern R. Co.*, 489 F.2d 632, 633 (8 Cir., 1974); *Taylor vs. United States*, 642 F.2d 1118 (8 Cir., 1981). Legal error, inconsistency, and inflexibility are not grounds for Rule 60(b) relief in the Third Circuit *Martinez-McBean vs. Government of Virgin Islands*, 562 F.2d 908 (3 Cir., 1977) and elsewhere, *Alvestad vs. Monsanto Co.*, 671 F.2d 908 (5 Cir 1982).

A court should not attempt to grant relief from dismissal on the ground that counsel's conduct imposes a penalty upon the client *Link vs. Wabash R.*, 370 U.S. 626, 633-34 82 S.Ct. 1386, 1390 (1962). Usually, as in this case, neither ignorance nor carelessness on the part of counsel, and neither inadvertence or mistake on the part of counsel or his staff do not constitute excusable neglect or grounds for Rule 60(b) relief, *e.g.*, *State of Oregon vs. Champion International Co.*, 680 F.2d 1300 (9 Cir. 1982) (addressing notice of appeal to state court); *United States vs. Thompson*, 438 F.2d 254, 257 (8 Cir., 1971) (failure to bring statute to court's attention); *Nugent vs. Yellow Cab Co.*, 295 F.2d 794 (7 Cir 1961) (mutually mistaken ignorance and agreement for unauthorized extension of time).

Turning momentarily to the subdivisions of Rule 60(b), one may perceive additional difficulties with the

course charted by the lower court's June 15, 1983 opinion and judgment, beyond the jurisdictional and time problems already noted, Subdivision (2) ["newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)"] does not obtain because respondents contested petitioners' motions on the merits, and because respondents' later motion for reconsideration cited evidence which respondents admitted was available to them before the District Court granted petitioners' motions. Subdivisions (3), (4), and (5) do not obtain under the purported "unique circumstances" delineated by respondents in their supplemental briefs to the Court of Appeals. Those briefs do not mention and do not allude to fraud, misrepresentation or other misconduct of defendants to a void judgment or to the destruction of a judgment based upon which the judgment of the District Court was based. Subdivisions (1) and (6) are mutually exclusive *Corex Corp. vs. United States*, 638 F.2d 119, 121 (9 Cir., 1981), but the "unique circumstances" advanced by respondents fall short of satisfying the strict, extraordinary circumstances contemplated by the Rules.

Respondents have contended that their predicament was caused by the District Court's statement in its September 17 order that it no longer had jurisdiction because of respondents' July 23 notice of appeal, and by respondents' thought that their motion for reconsideration was neither timely under Rule 59 nor a motion under F.R.C.P. 59 and F.R.A.P. 4(a)(4). The District Court never opined on the validity of respondents' notice of appeal, a subject specifically addressed by F.R.A.P. 4(a)(4). The District Court never opined on the nature or timeliness of respondents' July 6 motion. The District Court never invited respondents to file a notice of appeal before decision was made on their motion for reconsideration, and the District Court never stated that respondents could relax the viligence and to forebear from the action specifically required by F.R.A.P. 4(a)(4). In sum,

the circumstances cited by respondents below do not "put forth grounds for 'relief from the operation of the judgment,' as distinct from relief from the strictures upon time for appeal" 7 *Moore's Federal Practice* ¶60 27[2]. Respondents should not be afforeded the further relief permitted by the Court of Appeals.

CONCLUSION

The opinion and judgment of the Court of Appeals present serious questions of public importance regarding the meaning and viability of the rules and decisions pertaining to proper and timely appellate practice. The course mapped by the opinion and judgment differs greatly from and are contrary to the results reached in identical or substantially similar cases and finds no cited precedent, either stated in the opinion or disclosed by counsel's research into the prior reported decisions of the Court of Appeals. The course charted by the opinion and judgment of the lower court attempts to do indirectly what cannot be done directly. For these reasons, therefore, petitioners respectfully file this petition for certiorari.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1456

SAMES, ROGER; TROCCOLA, DENNIS,
Appellants

v.

GABLE, CARSON S.; DADDONA, JOSEPH S.;
CITY OF ALLENTOWN

(D.C. Civ. No. 82-1237)
On Appeal from the United States District Court
for the Eastern District of Pennsylvania

Present: HUNTER, HIGGINBOTHAM, *Circuit Judges*
and GERRY, *District Judge**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel April 11, 1983.

On consideration whereof, it is now here ordered and adjudged by this Court that the within appeal be, and the same is hereby dismissed without prejudice to the filing of an appropriate Rule 60(b), motion in the district court. It is further ordered and adjudged that if the

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* Honorable John F. Gerry, United States District Judge for the District of New Jersey, sitting by designation.

new judgment is entered and a valid notice of appeal is filed, the parties may rely on the same briefs except to the extent that they may wish to make changes and the Clerk of this Court will expedite any such appeal. Costs taxed against appellants.

ATTEST:

Clerk

June 15, 1983

APPENDIX B
NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1456

SAMES, ROGER; TROCCOLA, DENNIS
Appellants

v.

GABLE, CARSON S.; DADDONA, JOSEPH S.;
CITY OF ALLENTOWN

Appeal From the United States District Court
For the Eastern District of Pennsylvania
D.C. Civil No. 82-1237

Argued April 11, 1983

Before: HUNTER, HIGGINBOTHAM, *Circuit Judges*, and GERRY,* *District Judge*

Opinion filed June 15, 1983

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*Hon. John F. Gerry, United States District Judge for the District of New Jersey, sitting by designation.

OPINION OF THE COURT

PER CURIAM:

1. Plaintiffs/appellants Roger W. Sames and Dennis J. Troccola appeal from an order of the United States District Court for the Eastern District of Pennsylvania dismissing a portion of their claims and granting summary judgment on the remainder of their claims. We cannot reach the merits of this appeal because appellants' notice of appeal is invalid.[1]

2. On June 25, 1982, the district court filed an order granting defendants' motion to dismiss and their motion for summary judgment. On July 6 appellants served a motion for reconsideration which was filed in the district court on July 8. Thereafter, on July 23 they filed their notice of appeal. On September 17 the district court denied appellants' motion for reconsideration.

3. Fed. R. App. P. 4(a)(4) provides in pertinent part as follows:

> If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required, if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect.

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1. We are obligated to resolve questions concerning our jurisdiction even when the parties do not raise them. *See Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 102 S. Ct. 2099, 2104 (1982); *de la Fuente v. Central Elec. Coop.*, 703 F.2d 63, 64 n.1 (3d Cir. 1983).

In *Griggs v. Provident Consumer Discount Co.*, 103 S. Ct. 400 (1982) (per curiam), the Supreme Court made it clear that Rule 4(a)(4) must be read literally and that a premature notice of appeal "is as if no notice of appeal were filed at all." *Id.* at 403. If no notice of appeal is filed, the court of appeals lacks jurisdiction to act. *Id.* In *de la Fuente v. Central Electric Cooperative, Inc.*, 703 F.2d 63 (3d Cir. 1983) (per curiam), we noted that in order for Rule 4(a)(4) to apply, the motion filed in the district court must be one of the motions listed in the rule, and the motion must be timely. *Id.* at 64-65.

4. In this case appellants' motion for reconsideration is properly treated as a Fed. R. Civ. P. 59(e) motion to alter or amend the judgment. *Richerson v. Jones*, 572 F.2d 89, 93 (3d Cir. 1978); *Gainey v. Brotherhood of Railway and Steamship Clerks*, 303 F.2d 716, 718 (3d Cir. 1962). It is therefore one of the motions to which Rule 4(a)(4) applies. Furthermore, appellants' Rule 59(e) motion was timely when served on July 6.[2]

5. Because appellants filed their notice of appeal while their timely Rule 59(e) motion was pending in the district court, their notice of appeal is a "nullity." *Griggs*, 103 S. Ct. at 403. In the past, however, this

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2. Fed. R. Civ. P. 59(e) states that a motion to alter or amend a judgment shall be *served* not later than 10 days after entry of judgment. *See Sonnenblick-Goldman Corp. v. Nowalk*, 420 F.2d 858, 859-61 (3d Cir. 1970); 9 J. Moore, B. Ward, & J. Lucas, Moore's Federal Practice ¶ 204.12 [2] (2d ed. 1983) (10-day limit measured from time of service rather than from time of formal filing).

In this case the district court entered judgment on June 25, 1982. The tenth day after entry of judgment was Monday, July 5. Because Independence Day fell on Sunday in 1982, we take judicial notice of the fact that Monday, July 5 was a legal holiday. *See generally* Exec. Order No. 11,582, 3 C.F.R., 1971-75 Comp. at 539-41, *reprinted in* 5 U.S.C. §6103 app. at 561 (1976). Fed. R. Civ. P. 6(a) indicates that in computing a limitations period, the last day in the period shall not be counted if it is a legal holiday. Thus appellants' Rule 59(e) motion was timely when served on July 6.

Court has allowed appellants in similar circumstances to move the district court under Fed. R. Civ. P. 60(b) to vacate and re-enter judgment so as to allow appellants to appeal from the re-entered judgment. We believe that that procedure provides a fair result for both parties in this case as well.[3]

6. Accordingly we will dismiss the appeal without prejudice to the filing of an appropriate Rule 60(b) motion in the district court. If the new judgment is entered and a valid notice of appeal is filed, the parties may rely on the same briefs except to the extent that they may wish to make changes. The clerk of the court of appeals will expedite any such appeal.

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3. We therefore will not consider whether this case involves "unique circumstances" such as those recognized by the Supreme Court in *Thompson v. INS*, 375 U.S. 384 (1964) (per curiam).

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1456

SAMES, ROGER; TROCCOLA, DENNIS,
Appellants

v.

GABLE, CARSON S.; DADDONA, JOSEPH S.;
CITY OF ALLENTOWN

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, *Circuit Judges*

The petition for rehearing filed by

APPELLEES

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ James Hunter, III
Judge

Dated: July 14, 1983

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

	:	Civil Action
ROGER SAMES DENNIS TROCCOLA	:	
v.	:	
CARSON S. GABLE	:	
JOSEPH S. DADDONA City of Allentown	:	No. 82-1237

CIVIL JUDGMENT

Before the Honorable E. MacTroutman

AND NOW, this 23rd day of June 1982, in accordance with the Court's Memorandum and Order of this date,

IT IS ORDERED that Judgment be and the same is hereby entered in favor of defendants and against plaintiffs with repect to all claims predicated upon a political firing.

Entered: 6/25/82
Clerk of Court

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROGER SAMES DENNIS TROCCOLA	:	
v.	:	Civil Action No. 82-1237
CARSON S. GABLE JOSEPH S. DADDONA City of Allentown	:	

ORDER

TROUTMAN, J.

AND NOW, this 23rd day of June , 1982, IT IS ORDERED that defendants' motion to dismiss all claims predicated upon an unconstitutional taking of property is GRANTED. IT IS FURTHER ORDERED that defendants' motion for summary judgment on all claims predicated upon a political firing is GRANTED.

IT IS FURTHER ORDERED that plaintiffs' pendent claims are DISMISSED without prejudice.

_____
J.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROGER SAMES DENNIS TROCCOLA	:	
v.	:	Civil Action No. 82-1237
CARSON S. GABLE JOSEPH S. DADDONA City of Allentown	:	

MEMORANDUM AND ORDER

TROUTMAN, J. JUNE 23, 1982

Complaining that they were unconstitutionally demoted from sergeant to patrolmen because of their support of an unsuccessful candidate for mayor, plaintiffs instituted suit against defendants, City of Allentown (City), Police Chief Gable and Mayor Daddona. Specifically, plaintiffs, former sergeants on the Allentown police force, contend that their demotion without a hearing to determine "just cause" amounted to a "taking" of property without due process. Moreover, since the asserted motivation for the demotion was the support of a political candidate, plaintiffs argue that their First Amendment rights were violated. *Branti v. Finkel*, 445 U.S. 507 (1980); *Elrod v. Burns*, 427 U.S. 347 (1976). Relief is sought pursuant to the Civil Rights Act of 1871, 42 U.S.C. §1983 and §1985(3). Plaintiffs have also appended various state claims.

Defendants initially moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). While that motion was still pending, they filed an appropriately supported motion for summary judgment. Upon consideration of both mo-

tions, we grant the motion to dismiss all claims based upon an unconstitutional "taking" and enter judgment upon plaintiffs' allegations of a political firing.

In order to withstand defendants' motion for summary judgment, plaintiffs may not rest upon the mere allegation of their complaint. Rather, they must respond by affidavit or otherwise and adduce *specific facts* showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). *See Ness v. Marshall*, 660 F. 2d 517, 519 (3d Cir. 1981); Advisory Committee's Notes on 1963 Amendment to Rule 56(e). Ignoring this command, plaintiffs have failed to point to any *specific facts* which show that there is a genuine issue for trial on the issue of a politically motivated firing. In their depositions, defendants Gable and Daddona denied any political motivation in the decision to demote plaintiffs. In fact, both defendants testified that they believed that plaintiffs were involved in threatening and spying upon and fighting with other city police officers. Hence, they demoted them in an effort to improve morale. The establishment of these uncontroverted facts as to defendants' motives, warrants entry of judgment on the issue of a politically motivated firing.

We turn now to plaintiffs' claim that their demotion was a "taking" of their property without due process. Our inquiry regarding whether a police sergeant's rank is considered constitutionally protected "property" revolves around state law, for it, rather than federal law, creates and defines the contours of "property rights". *Board of Regents v. Roth*, 408 U.S. 564 (1972). A claim of entitlement is decided by reference to state law. *Bishop v. Wood*, 426 U.S. 341 (1976); *Kelly v. Warminister Township Board of Supervisors*, 512 F. Supp. 658, 600, n.2 (E.D. Pa. 1981); *Skrocki v. Caltabiano*, 505 F. Supp. 916, 918 (E.D. Pa. 1981). We must determine whether Pennsylvania considers sergeant's stripes, issued by a third-class city, to be "property" which can only be taken away by a process which is legally due.

Petrillo v. City of Farrella, 345 Pa. 518, 520-21 (1942) held that state civil service requirements only protect a police officer's status as patrolman. A demotion without a hearing is permissible since civil service rights and protections attach only to the position of police force member. Ten years later, in *Zebyle v. Bettor*, 371 Pa. 546, 549 (1952), the Pennsylvania Supreme Court, in a *quo warranto* action, held that a third-class city may demote a policeman without a hearing so long as the officer remains a member of the force. Significantly, defendant Allentown is a third-class city.

Plaintiffs' reliance upon *George v. Moore*, 394 Pa. 419 (1959) and *Oswald v. City of Allentown*, 388 A. 2d 1128 (1978), cases which considered due process rights of fired and not demoted police officers is misplaced. *George v. Moore*, 394 Pa. at 421, held that a hearing is required in order to lawfully fire a police officer. Likewise, the issue before the Commonwealth Court in *Oswald, supra*, was whether defendant had permissibly terminated plaintiff police officer after according him a due process hearing. Neither *George* nor *Oswald* support the proposition that a third-class city must convene a hearing before demoting a police officer; rather, they hold that such a hearing is required before a permissible termination occurs.

Plaintiffs' reliance upon 53 P.S.C.A. §53251 which generally regulates municipal-police relationships and 53 P.S.C.A. §53270 which specifically prohibits demotions for "political reasons" is likewise erroneous. These statutes on their face apply only to "incorporated towns" and do not regulate third-class cities.

> 53 P.S.C.A. §37001 provides in relevant part that no member of the city police force . . . shall be demoted in rank . . . except upon proper cause shown . . .

Plaintiffs argue that this statute evidences the fact that Pennsylvania considers sergeant stripes to be "property"

which can only be taken away after a hearing to determine "proper cause". We disagree.

Sweeny v. Johns, 380 A. 2d 504 (1977) relying upon 53 P.S. §37002, the very next statutory sub-section, held that a third-class city's mayor may properly demote the police chief and "other officers without cause, and without a hearing or other civil service protection". *Id.* This is because third-class cities which have adopted the optional charter form of government, as has defendant Allentown, can supersede statewide statutes which govern "personnel and administration" policies. *Greenberg v. Bradford*, 432 Pa. 611, 614 (1968).

Because we conclude that Pennsylvania does not consider the position of police sergeant in a third-class city with an optional charter form of government to be a property right, we will grant defendants' motion to dismiss all federal claims based upon the "taking" thereof.

In view of our holding, we also dismiss plaintiffs' pendent claims. Pendent jurisdiction is discretionary, *Lentino v. Fringe Employee Plans, Inc.*, 611 F. 2d 474, 478 (3d Cir. 1979), and plaintiffs may claim no right thereto. *Wire Mesh Products, Inc. v. Wire Belting Association*, 520 F. Supp. 1005 (E.D. Pa. 1981).

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROGER SAMES DENNIS TROCCOLA	:	
v.	:	Civil Action
CARSON S. GABLE	:	No. 82-1237
JOSEPH S. DADDONA City of Allentown	:	

ORDER

TROUTMAN, J.

AND NOW, this 15th day of September, 1982, upon consideration of plaintiff's motion for reconsideration and defendants' response thereto, IT IS ORDERED that the motion is DENIED.[1]

J.

1. Numerous factors compel this conclusion. On July 22, 1982, plaintiff filed a notice of appeal which divested this Court of jurisdiction to consider the instant motion. This rule enjoys a long history of acceptance, *Hovey v. McDonald*, 109 U.S. 150, 157 (1883), and remains undiluted by the passage of time. *Plant Economy, Inc. v. Mirror Insulation Co.*, 308 F. 2d 275, 276-77 (3d Cir. 1982). Indeed, the Third Circuit considers the rule "well settled". *Securities & Exchange Comm'n. v. Investors Security Corp.*, 560 F. 2d 561, 568 (3d Cir. 1977). However, because we retain "limited authority to . . . assist the Court of Appeals . . . in its determination" of the issues on appeal, *id*, we briefly address the issues raised by plaintiff's motion.

Plaintiffs' reliance upon their verified complaint in lieu of affidavits when they originally opposed defendants' motion is misplaced. True, *Ratner v. Young*, 465 F. Supp. 386, 389, n. 5 (D. V.I. 1979), held that reliance upon a verified complaint can be equated

with reliance upon a properly filed affidavit. Fed. R. Civ. P. 56(e) requires that affidavits be made upon "personal knowledge" and set forth "facts as would be admissible in evidence". *See, First National Bank Co. v. Insurance Co. of North America*, 606 F. 2d 760, 766 (7th Cir. 1976); *Kohr v. Johns-Manville*, 534 F. Supp. 256, 258 (E.D. Pa. 1982); *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.*, 513 F. Supp. 1100, 1118 (E.D. Pa. 1981).

In the case at bar, the verification appended to plaintiffs' complaint states that the facts alleged are true "to the best of [plaintiff's] knowledge, information and belief". Moreover, the affidavits submitted in support of plaintiffs' motion to reconsider contain hearsay and other inadmissible, irrelevant statements. *Wire Mesh Products, Inc. v. Wire Betting Ass'n.*, 520 F. Supp. 1004, 1006, n. 17 (E.D. Pa. 1981); *Sims v. Mack Truck Corp.* 483 F. Supp. 592, 602 (E.D. Pa. 1980). In fact, we recently elaborated upon the standard which a Rule 56 affidavit must meet. That discussion, set forth below, applied with equal force to a verified complaint which is relied upon in opposition to a motion for summary judgment.

> Rule 56 requires that
>
> > affidavits must be made upon personal knowledge, *Williams v. Evangelical Retirement Homes*, 594 F. 2d 701, 703 (8th Cir. 1979), devoid of hearsay, conclusory language and statements which purport to examine thoughts as well as actions. *Maiorana v. MacDonald*, 596 F. 2d 1072, 1080 (1st Cir. 1979). Affidavits speculating as to motivations but containing no factual support do not conform to the rule, *Gatling v. Atlantic Richfield Co.*, 577 F. 2d 185, 188 (2d Cir.), *cert. denied*, 439 U.S. 861, 99 S. Ct. 181, 58 L. Ed. 2d 169 (1978), and statements prefaced by the phrases, "I believe" or "upon information and belief" or those made upon an "understanding", *Cermetek, Inc. v. Butler Arpak, Inc.*, 573 F. 2d 1370, 1377 (9th Cir. 1978), are properly subject to a motion to strike. Moreover, affidavits which contain conclusions of law, ultimate facts, assertions, arguments and inferences derived from the opposing party's affidavits similarly may be "disregarded". *Cohen v. Ayers*, 449 F. Supp. 298, 321 (E.D. Ill. 1978), *aff'd mem.*, 596 F. 2d 733 (7th Cir. 1979).

Carey v. Beans, 500 F. Supp. 580, 583 (E.D. Pa. 1980), *aff'd*, 659 F. 2d 1065 (3d Cir. 1981).

Plaintiffs also assail this Court's decision as being premature in that discovery was still outstanding when we ruled upon the motions. We have again studied plaintiffs' opposition to defendants' motion for summary judgment (Document 25) and are unable to

NOTE — (*Continued*)

find any indication contained therein that discovery was, at that time, incomplete. In fact, plaintiffs' "Counterstatement of The Facts" states the status of discovery but fails to even hint that an inadequate factual record precludes summary judgment.

We now address plaintiffs' contention that summary judgment was improperly entered because we failed to permit counsel to argue the motion. Specifically, they assert that they lacked "notice" that we would rule on the motion. This argument lacks merit. The "notice" provisions of Fed. R. Civ. P. 56 were more than adequately met in that plaintiffs had "prior knowledge that the court was considering . . . summary judgment". *Bryson v. Braud Insulations, Inc.*, 621 F. 2d 556, 559 (3d Cir. 1980). Proof of this fact is clear from the record. Plaintiffs' opposition to defendants' motion was even captioned "Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment". *See*, Document 25. Hence, plaintiffs cannot argue now that they had no notice of the fact that a Rule 56 motion was pending. Additionally, whether oral argument on any particular motion is warranted is committed to the Court's sound discretion. *See*, E. D. Pa. Local R. Civ. P. 20(f).

Finally, plaintiffs argue that we misread Pennsylvania case and statutory law in deciding that plaintiffs' sergeant stripes were not "property". We disagree with them for the reasons set forth in our memorandum of June 23, 1982.